IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 4797 OF 2007

Ghansshyam V. Choukulkar & Ors..... ....Petitioners.
V/s
Shashikant V. Choukulkar..... ....Respondent.

Mr.G.S.Godbole, Adv. For the petitioners.

Mr.A.S.Khandeparkar i/by Khandeparkar & Associates for respondent.

CORAM: A.P.DESHPANDE, J.
31/7/07

PC:

Rule. Rule made returnable forthwith.

Taken up for final hearing by consent of parties.

By the present writ petition two orders passed by the trial Court below exhibits 653 and 655 are challenged by the original plaintiff and original defendant Nos. 3 to 5. The plaintiff instituted a suit for partition and separate possession claiming that the suit properties are joint family properties. The defendant No.1 by filing written statement opposed the claim by contending that the suit properties are self acquired properties. Defendant Nos. 2 to 5 had supported the plaintiff in making the claim for partition. Defendant No.2 is the mother of parties to the suit and she expired during pendency of the suit. The defendant No.2 had filed written statement admitting the claim made in the plaint. Before the death of defendant No.2 she had purportedly executed a will in favour of

plaintiff and other defendant barring defendant No.1. The plaint came to be amended and necessary issues in regard to execution of will also came to be framed by the trial Court. It so happened that the plaintiff closed his evidence under an assumption that the will has been proved as the same was exhibited. Having realised that having regard to the provisions of section 68 of the Indian Evidence Act will is not proved, the plaintiff moved an application at Ex.655 seeking to examine the attesting witnesses with a view to prove the will. The said application came to be rejected by the trial Court on two grounds; one that as the will has been exhibited there is no reason for the plaintiff to examine the attesting witnesses and two that the application was belatedly filed. The other application at Exh.653 was filed by original defendant No.4 with a view to have the said defendant examined before the examination of defendant No.1. However that application has been rejected. On account of rejection of application at Exh.653 defendant No.4 will be examined and/or lead evidence after evidence of defendant No.1 is over. As defendant No.4 will not be prejudiced on account of deferring of his evidence after evidence of defendant No.1, learned counsel for the petitioner does not press the writ petition to that extent. So far as order below Exh.655 is concerned both the learned counsel are in agreement that the said order be quashed and set aside and plaintiff be permitted to examine the attesting witnesses and the doctor forthwith before the

examination of defendant No.1. True it is that the application at Ex.655 has been belatedly filed i.e. after filing of affidavit in examination in chief by defendant No.1. On account of belated filing defendant No.1 has been put to inconvenience. Hence petitioner shall pay a sum of Rs.10,000/- to defendant No.1 within a period of four weeks from today towards costs. As I have passed the order on concession made available by the learned advocates appearing for respective parties I have not recorded reasons in support of the order. Having regard to the fact situation of the present case I direct the trial Court to decide the suit as expeditiously as possible, preferably within a period of four months from today. Rule made absolute in above terms.

31.7.07